Supreme Court, U.S.
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No. 95-1503

In The

Supreme Court of the United States

October Term, 1995

SHERIFF RICHARD MACK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE PETITIONER

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57 pp

QUESTIONS PRESENTED

1. Whether Congress exceeds its Commerce Clause powers when it orders State officials, themselves neither engaged in nor interfering with interstate commerce, to exercise their police powers with regard to commerce.

2. Whether a Federal statute requiring State officials to investigate and pass upon the background of each handgun purchaser can be reconciled with the Tenth Amendment as construed in *New York v. United States*, 505 U.S. 144 (1992), in that it commandeers a State official's labor rather than his policymaking.

PARTIES TO THE PROCEEDING

All parties to this proceeding are reflected in the caption; none have parent entities or subsidiaries.

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OPINIONS BELOW

The opinion of the United States Court of Appeals is reported as *Mack v. United States*, 66 F.3d 1025 (9th Cir. 1995) and is reproduced in the Appendix to the Petition for Certiorari ("App.") at 1. The unpublished order of the Court of Appeals denying the petition for rehearing is reproduced at App. 24. The opinion of the United States District Court is reported as *Mack v. United States*, 856 F. Supp. 1372 (D. Ariz. 1994) and is reproduced at App. 26.

JURISDICTION

On September 8, 1995, the Court of Appeals entered judgment upholding the validity of the statutory provisions in question. On December 19, 1995, the Court of Appeals denied Petitioner's petition for rehearing. The Petition for a Writ of Certiorari was filed on March 19, 1996 and granted on June 17, 1996. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Article I, §8 of the Constitution of the United States provides:

> Congress shall have the power . . . to regulate Commerce with foreign Nations, and among the several States. . . .

Amendment 10 to the Constitution of the United States provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Pub. L. 103-159, 107 Stat. 1536 (1993), codified as 18 U.S.C. §§922(s)-(t), 924, 925A, is reproduced in full at App. 51-62.

STATEMENT OF THE CASE

The present case involves constitutional challenges to Pub. L. 103-159, 107 Stat. 1536 (1993) ("Brady Act"), which amended the Gun Control Act of 1968, codified as 18 U.S.C. §§921 *et seq.*

(i) Background to the Statute

The Gun Control Act of 1968 prohibited the receipt of firearms by certain categories of persons, generally including those convicted of certain offenses, undocumented aliens, users of illicit drugs, those who have been the subject of certain mental adjudications, those given dishonorable military discharges, persons who have renounced American citizenship, and those subject to certain domestic restraining orders. 18 U.S.C. §922(g), (n).

Under the 1968 Act, persons engaged in the business of dealing in firearms were required to obtain Federal licenses. 18 U.S.C. §922(a)(1). An individual purchasing a firearm from a Federally-licensed dealer was required to

certify that he or she fell within none of the forbidden categories; the certification was available for inspection by Federal agents, who might bring charges as appropriate. 18 U.S.C. §923(g)(1)(A),(B); 27 C.F.R. §§178.124, 178.161.

(ii) Enactment of the Statute

Concerned that prohibited purchasers were defying these restrictions, the 102d Congress weighed creation of additional barriers. These ultimately took form as H.R. 7, which would have required licensed dealers to notify local police of a handgun sale and make no transfer until seven days had passed. *See* H.R. Rep. No. 103-344 (103d Cong., 1st Sess.) at 13-14 *reprinted* 1993 U.S. Code, Cong. & Admin. News at 1990-91. H.R. 7 thus gave an opportunity for a background check, but imposed no mandate. "No duty is created for the chief of police." H.R. Rep. No. 102-47 (102d Cong., 1st Sess.) at 12.

The voluntary arrangement drew opposition. Sheriffs "might check, they might not check. There is no requirement." 137 Cong. Record H2676 (Daily ed. April 1, 1991) (Rep. Fields). "[W]hy does HR.7 provide for an optional, but not mandatory, background check . . . ?" *Id.* at H2668 (Rep. Vucanovich). "[I]t does not even ensure that a check is done." *Id.* at H2831 (May 8, 1991) (Rep. Ballenger). H.R. 7 failed of passage.

In drafting what became Public Law 103-159, the 103d Congress took a different approach. The resulting statute envisioned an eventual "permanent system" under which handgun purchasers would be checked against an automated Federal database of prohibited buyers. 18 U.S.C. §922(t).

Since Federal officials attested that years would pass before the required Federal database existed,[1] the statute created an "interim system" which relied on State authorities, and unlike H.R. 7 commanded action rather than provided an opportunity. 18 U.S.C. §922(s). The interim system would function until a Federal system became operational, or for a maximum of five years. Under it, local officials would be "required" to perform background checks on each handgun purchaser. H.R. Rep. No. 103-344 at 7, *reprinted as* 1993 U.S. Code, Cong. & Admin. News at 1984. Proposals by Rep. Schiff to make the State role voluntary by changing "shall" to "may" were rejected in subcommittee and committee. *See* H.R. Rep. No. 103-344 at 38-39, *reprinted* 1993 U.S. Code, Cong. & Admin. News at 2008-09. When Rep. Schiff attempted to renew his proposal on the floor, the bill's sponsor rejoined, "The mandatory requirement is the right requirement," 139 Cong. Record at H9095 (Daily ed., Nov. 10, 1993) (Rep. Hughes), and the attempt was twice voted down. *Id.* at H9093, H9143-44.

Under the interim system, Federally-licensed firearms dealers are required to send a form giving notice of each proposed handgun sale to their "Chief Law Enforcement Official" (CLEO),[2] a term defined to include State,

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[1] The Attorney General advised Congress that "enormous tasks remain" in creating the Federal system and that "It is a near certainty that a national instant-check system is more than five years away . . . " 139 Cong. Record at S16314 (Daily ed., Nov. 19, 1993). *See also id.* at H9130 (Rep. Schumer).

[2] Under some conditions, the dealer may have alternate modes of compliance available. Forms of compliance applicable to ordinary handguns are: (1) notify the CLEO and wait a

and not Federal, officials. 18 U.S.C. §922(s)(8). The CLEO is in turn required to make a "reasonable effort" to ensure that each purchaser so reported is permitted to receive firearms by all Federal, State, and local laws. 18 U.S.C. §922(s)(2). At minimum, this effort must include research into such Federal databases as the Attorney General may direct. *Id.* Pursuant to this mandate, the Attorney General issued Order No. 1853-94, commanding State CLEOs to consult two Federal databases. 59 Fed. Register 9498 (Feb. 28, 1994).

In the event the information the CLEO obtains proves to be incomplete or unclear – *e.g.*, it reflects a conviction for which the purchaser contends his civil rights have been restored – CLEOs were instructed to refuse approval, shift the burden of going forward to the purchaser, and to require him to prove his legal status.[3]

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maximum of five business days for clearance; (2) verify that the purchaser holds a permit under an appropriate State firearms permit law; or (3) obtain approval through a State system that verifies legal eligibility to purchase. 18 U.S.C. §922(s)(1)(A), (C), (D).

[3] If the buyer wants to contest his/ her status, you can be in the position of shifting the burden of tracking down absolute proof to the buyer. If the buyer can furnish you with criminal disposition records or other documents that establish that he/she is not prohibited from receiving or possessing a handgun, you could then notify the FFL [dealer] that you have withdrawn your objection to the sale.

Bureau of Alcohol, Tobacco and Firearms, "Open Letter to State and Local Law Enforcement Officials," Excerpts of Record on Appeal at 28, reproduced at Appendix to Brief for the United States, *Printz v. United States*, No. 95-1478, at 17a.

If the CLEO found no bar to the purchase, the statute commanded him to destroy the form and any references to it within twenty business days. 18 U.S.C. §922(s)(6)(B). If he found a bar, he must so inform the dealer and, if the purchaser requests, provide a written justification of his findings. 18 U.S.C. §922(s)(6)(C). Should the CLEO err in barring a purchase, the statute creates a Federal cause of action against his jurisdiction for correction and recovery of attorneys' fees. 18 U.S.C. §925A. Any violation of §922(s) is a Federal offense, punishable by up to a year's imprisonment. 18 U.S.C. §924(a)(5).

(iii) Facts

Petitioner Richard Mack is Sheriff, and thus CLEO, of Graham County, Arizona. As Sheriff, he is responsible for maintaining the peace of its 28,000 residents. Joint Appendix ["J.A."] at 4, 8.

The duties of the sheriff are defined by Title 11, Arizona Revised Statutes, J.A. 4, and do not include adjudicatory functions. The sheriff is charged with maintaining the peace, arresting offenders, suppressing riots, attending the courts when danger is apprehended, maintaining the jail, serving process, and conducting search and rescue operations. A.R.S. §11-441. Sheriff Mack's office had never handled duties similar to those imposed by the Federal statute; it had no mechanism for carrying them out and had no budget for their accomplishment. J.A. 9. State law forbids counties to impose regulations on the sale, ownership, or possession of firearms. A.R.S. §13-3108; Op. Ariz. Att'y Gen. No. I78-274.

To the extent Sheriff Mack attempted to perform the Federal duties, he incurred civil liability. Under Arizona law, a county official who expends funds in excess of statutory authority is personally liable for their refund, J.A. 9, in an action which may be brought by any taxpayer. A.R.S. §§11-641, 642.[4] The county had given Sheriff Mack no budget for background checks. J.A. 9.

Sheriff Mack has twelve sworn officers – including nine patrol deputies – to discharge his statutory duties for a 4,500 square mile jurisdiction. J.A. 8. Allowing for special details and leave time, he is able to average 1.5 deputies on patrol at any given time, to cover an area nearly the size of Connecticut. *Id.*

Under the new Federal mandate, Sheriff Mack was obliged to make reasonable attempts to verify that each handgun sold by the county's Federally-licensed dealers was being sold to a lawful purchaser. The work diverted one to two man-hours of effort per day. Appendix to Petition for Certiorari ["App."] 65. In the first three months, Sheriff Mack reviewed eighty to ninety proposed purchases. *Id.* Of these, one proved questionable; the purchaser disputed the finding, contending that his civil rights had been restored following the out-of-state conviction. Sheriff Mack followed the procedure advised, and indicated that the purchaser must provide proof of the restoration. *Id.* The constituent left in anger. *Id.*

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[4] Good faith – even reliance on advice of counsel – is no defense. *Hartford Accident & Indemnity Co. v. Wainscott*, 41 Ariz. 439, 19 P.2d 328 (1933).

Sheriff Mack undertook the labor of background checks only because the Federal statute compelled it. J.A. 9. His constituents subsequently blamed him for wasting county resources on the checks. App. 65-66. Some deputies have refused to assist, citing State rulings which forbid him to discipline employees for refusal to follow unconstitutional orders. J.A. 10.

(iv) Proceedings in the District Court

On February 28, 1993, Sheriff Mack commenced an action in the United States District Court, District of Arizona, invoking its jurisdiction under 28 U.S.C. §1331. He sought declaratory and injunctive relief establishing, *inter alia*,[5] that 18 U.S.C. §922(s) is violative of the Tenth Amendment and exceeds the Article I commerce power insofar as it orders a State official, not restricting or affecting the relevant commerce, to regulate and affect it.

The District Court (Roll, J.), relying upon this Court's decision in *New York v. United States*, 505 U.S. 144 (1992), declared unconstitutional those parts of 18 U.S.C. §922(s) which imposed duties upon State officials. The District Court rejected Federal attempts to distinguish *New York*

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[5] Sheriff Mack also contended that the duties imposed were void for vagueness, and that they violated the Thirteenth Amendment by requiring personal service under pain of law. The Court of Appeals ultimately held the vagueness contention unripe, and that the Thirteenth Amendment was not violated since State servants could avoid involuntary Federal servitude by resigning their office. App. at 16-19. As will be discussed *infra*, the latter conclusion raises its own Tenth Amendment difficulty.

on the claim that *New York* precluded only commandeering of State legislatures or other policymakers, while 18 U.S.C. §922(s) commanded State enforcement of Federally-designated policy:

> True, the Brady Act does not require the state to legislate in order to enforce its provisions. In this respect, however, it is more like the "take title" section of the unconstitutional statute in *New York* which essentially operated on default. This provision was found to be constitutionally defective even though no affirmative action was demanded of the state.

App. 42. The District Court did not strike the entire of §922(s), holding instead that the unconstitutional portion could be severed. App. 46-49.

(v) Proceedings in the Court of Appeals

A divided Court of Appeals reversed the judgment of the District Court holding portions of the statute unconstitutional. The majority disposed of the Commerce Clause issue with a footnote observing that firearms move in and affect interstate commerce. App.5 n.5. It dealt with the Tenth Amendment objection by concluding that *New York* does not bar mandates to enforce, as opposed to enact, designated Federal programs:

> The Brady Act is not the kind of a federal mandate condemned by *New York*, nor does it present the concerns related above. . . . [T]he CLEOs are not being commanded to engage in the central sovereign processes of enacting legislation or regulations. . . . Instead, they are directed to serve for a temporary period as law

> enforcement functionaries in carrying out a federal program.

App. 12-13. The majority recognized only one limit to the Federal power to commandeer officials: a Congressional mandate might be impermissible if it "stall[ed] state government in its tracks by imposing all-consuming federal duties on the State's employees." App. 14.

In dissent, Judge Fernandez argued that the enforce/enact distinction was inconsistent with *New York*, and that, if such a distinction could be drawn, mandated enforcement would be the *greater* infringement of federalism:

> Rather than ordering state legislatures or agencies to adopt a scheme for vetting requests for gun transfers, Congress has avoided that hindrance and dragooned the state officials directly. Under this new approach, the states have nothing to say about it. Their officials are ordered to become part of a federal gun control program at the state's own expense and are ordered to engage in various tasks necessary to administer that program.

App. 21.

From the Circuit ruling Sheriff Mack petitioned for certiorari on March 19, 1996. This Court granted the petition on June 17, 1996.

SUMMARY OF ARGUMENT

In enacting 18 U.S.C. §922(s), Congress chose to violate Tenth Amendment principles this Court enunciated

in *New York v. United States*, 505 U.S. 144 (1992) (*"New York"*). Concerned over illicit acquisitions of firearms from *Federal* licensees, Congress commanded *State* officials to check *Federal* forms against *Federal* databases and *Federal* restrictions. It commanded Sheriff Mack – a county official with powers limiting to maintaining the peace and enforcing the law – to serve as a Federal adjudicator. *The only compensation for the duty is exposure to civil liability:* should he bar a purchase, Congress granted the prospective buyer a cause of action against his county, with recovery of attorneys' fees. In commandeering the Sheriff's services, Congress placed him in a dilemma between violating Federal law, which requires him to approve or restrict gun purchases, and violating the law of his State, which forbids county officials to regulate firearms acquisition. He faces Federal criminal and civil liability should he fail to undertake the task, and State civil liability should he devote county resources to it.

The Congressional command cannot be justified by reference to caselaw antedating *New York*. This is not a situation where Congress has subjected a State to burdens imposed on the Federal electorate, so that the reactions of the latter offer some measure of protection against excess. Rather, Congress has driven a wedge between the interests of the State official and the electorate: the burden on the public – a undesired delay in consummation of a transaction – stands in inverse relation to the degree to which the State official assumes his burden by dropping his other tasks and complying with the Federal mandate. Nor is this a case where a State adjudicator, having appropriately general jurisdiction, is commanded to apply Federal law in the discharge of his existing duty.

Sheriff Mack is no adjudicator, he holds narrowly-defined powers, and these have never encompassed determinations of the type he is now commanded to make.

The statute at issue clearly fails the standards of *New York*. The enact/enforce distinction drawn by the Circuit below is untenable. 18 U.S.C. §922(s) differs from the statute at issue in *New York* only in that it involves a more striking violation of constitutional norms. The State legislature is not commandeered; its functions are usurped. State officials must follow Congressional commands even if in so doing they violate State law. The people cannot fix the powers of the offices they create, determine the allocation of the resources they provide, or elect any citizen unwilling to carry out whatever duties Congress may have assigned.

If Congress can usurp the role of the State legislature and flatly command State officials to carry out its policies – indeed, to exceed their defined powers and to violate State law – then federalism is not merely impaired: it is dead. The State's residual sovereignty is an empty shell; its legislature cannot command even its own public officials.

ARGUMENT

I

18 U.S.C. §922(s) Violates Principles Of Federalism Underscored By The Tenth Amendment

18 U.S.C. §922(s) invents the post of "Chief Law Enforcement Official," ("CLEO"), specifically defining it to include only those holding State office. Indeed, Congress rejected committee amendments which proposed to have the CLEO's tasks undertaken by Federal employees.

See H.R. Rep. No. 103-344, at 38-39, *reprinted* 1993 U.S. Code, Cong. & Admin News at 2008.

The duties of the invented post are onerous. The CLEO must make reasonable efforts to ensure that each purchaser of a handgun from a Federally-licensed dealer is not barred from purchasing by any Federal, State, or local law. 18 U.S.C. §922(s)(2). Merely insuring that a person is not barred from gun ownership under Federal law requires making a determination that he does not fall into any one of eight categories, ranging from persons convicted of a "crime punishable by more than a year's imprisonment" (but excluding those who have received restorations of civil rights or Federal "relief from disabilities") to those with dishonorable military discharges or who have renounced citizenship. 18 U.S.C. §922(g). Where available records leave room for doubt, the CLEO must shift the burden of proof to the purchaser and assess the weight of the documentation he provides.[6] If he errs in denying clearance, Congress has given the rejected buyer a cause of action against his county, with recovery of attorneys' fees. 18 U.S.C. §925A.

Sheriff Mack has but a limited force – averaging 1.5 deputies on patrol at any given time – to maintain the peace in an area nearly the size of Connecticut. J.A. 8. The Federal mandate commandeers one to two man-hours of effort per day from this resource. App. 65. The result has been of no benefit to his office or his county. In three months of compelled effort, his office found exactly one purchase which was even questionable. App. 65-66.

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[6] *See* note 3, *supra*.

This commandeering of State resources, and requirement that they be used in violation of State law, marks an exceptionally clear Tenth Amendment violation. It cannot be justified by reference either to *New York* or to rulings which antedate that decision.

Indeed, to defend the statute at issue the United States must reverse the Tenth Amendment interpretation it espoused in *New York*. There, the United States took pains to distinguish its facts from those of a hypothetical mandate to regulate private activity to Federal specification, contending that the latter would mark a *worse* violation of federalism:

> [C]onstruction of a state-owned facility – although it would require a significant commitment of state resources – is qualitatively different from the implementation of federal policies regulating private activity, which would transform state administrative bodies into 'field offices of the national bureaucracy.' *FERC v. Mississippi*, 456 U.S. at 777.

Brief of the United States, *New York v. United States*, at 36-37. Only two years ago, the United States reiterated this position: compelled State enforcement of Federal law would comprise the archetypical violation of *New York*.[7]

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[7] *See* Reply Brief of the United States, *United States v. Lopez* (No. 93-1260) at 10:

> Under this Court's decision in *New York v. United States, supra*, very different constitutional issues would be presented if Congress imposed statutory requirements or prohibitions directly upon state and local educational officials, or if Congress mandated that state and local governments assume responsibility for the enforcement of federal law.

To defend 18 U.S.C. §922(s), the United States must now contend that forcing States to implement "federal policies regulating private activity" and to "assume responsibility for the enforcement of federal law" are exemplars of federalism and not of its most egregious violation.

A. 18 U.S.C. §922(s) Cannot Be Justified By Reference To Rulings Of This Court Antedating *New York v. United States.*

1. Statutes Equally Burdening States And The Federal Electorate: *Garcia v. San Antonio Metropolitan Transit Authority.*

Pre-*New York* Tenth Amendment case law evolved in two contexts. The first involved coverage of generally applicable Federal legislation, such as that regulating employment. Here the original landmark was *National League of Cities v. Usery*, 426 U.S. 833 (1976), which held minimum wage provisions inapplicable to key State employees.

Usery was overruled by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), in which the Court suggested that the political process itself could protect States in the context presented: where the burden imposed by the legislation was equally applicable to the voting citizenry, the electoral process would ensure that it was not oppressive. 469 U.S. at 554.

18 U.S.C. §922(s) plainly falls outside the parameters of *Garcia*. By burdening State and private employers alike, the statute in *Garcia* created a natural alliance of

interests. The dynamics of the statute here instead function to "divide and conquer." Sheriffs are burdened by performing the checks; the electorate is not. Indeed, the public is burdened most severely when the sheriffs *do not* perform the checks: in that event each purchaser must wait the full five business days. The national sovereign aggravated the division of interests by on the one hand commanding the sheriff to withhold approval if records are incomplete, *see* note 3, *supra*, and on the other granting the citizen the right to sue him, and recover attorneys' fees, if he fails to approve a qualified buyer. 18 U.S.C. §925A.

2. Statutes Singling Out States But Offering Constitutionally Valid Alternatives: *Hodel* And *FERC*

In deciding *Garcia* this Court did not rule out substantive limitations on Federal power in contexts other than those presented by a statute equally burdening private parties and the States:

> These cases do not require us to identify or define what affirmative limits the constitutional structure might impose on Federal action affecting the States under the Commerce Clause. *See Coyle v. Oklahoma*, 221 U.S. 559 (1911).

469 U.S. at 556. The reference to *Coyle* – which had rejected Congressional attempts to prevent the relocation of a State capital – suggested what those "affirmative limits" might comprise. *Coyle* remained good law because, unlike the wage and hour law upheld in *Garcia*, the statute invalidated in *Coyle* applied only to a State

government – indeed, it *could* apply only to a State government.

This admonition proved too subtle a caution to restrain Congressional appetites. The second aspect of pre-*New York* case law evolved out of Federal attempts to target State officials for performance of desired Federal services.

For a time, a definitive holding on the Tenth Amendment could be avoided. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), posed a challenge to the Surface Mining Act. That act imposed Federal regulations on coal mining, but excepted those States whose regulatory system met certain Federal standards. The Court found no constitutional violation: imposition of Federal regulations would be justified as Commerce Clause pre-emption and States were afforded this as an alternative to accepting the Federal standards. If a State declined to comply, "the full regulatory burden will be borne by the Federal government." 452 U.S. at 288.

Hodel was quickly followed by *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982) ("*FERC*"). The statute at issue was the Public Utilities Regulatory Policy Act ("PURPA"), Pub. L. 95-617, 92 Stat. 3119, which required that State utility commissions implement certain regulations and that they provide certain administrative relief.

A sharply divided Court upheld the requirements against Tenth Amendment attack. Although the statute provided no express exception, the majority noted that States could escape its mandate by withdrawing from

regulating interstate commerce, *i.e.*, electrical power distribution. 456 U.S. at 765.

18 U.S.C. §922(s) stands in sharp contrast to the Surface Mining Act and to PURPA. Here, State officials cannot escape the mandate by accepting Federal pre-emption or by simply withdrawing from regulating the field. Indeed, the Sheriff's county *has been* withdrawn from the field by statute. A.R.S. §13-3108.

3. Statutes Requiring Non-Discriminatory Application By State Adjudicators: *Testa v. Katt* And *FERC*.

In discussing PURPA's requirements that State utilities commissions adjudicate certain disputes, and its establishment of a private cause of action to review certain decisionmaking, the *FERC* majority suggested in *dictum*[8] that the situation might be analogized to that presented by *Testa v. Katt*, 330 U.S. 386 (1947), *see* 456 U.S. at 760. *Testa* had involved a refusal by Rhode Island courts to entertain treble-damage suits under Federal wartime price controls: the State court had treated these as extrajurisdictional "penal statutes" which it need not enforce. *Testa* held that the resulting discrimination against Federal causes of action offended the Supremacy Clause; courts of general jurisdiction by definition decide all legal issues brought before them, and a constitutional

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[8] After discussing the analogy, the majority notes that "it plainly is not necessary" to reach the issue since PURPA allowed the State to escape the mandate by withdrawing from the field. 456 U.S. at 764.

Federal statute is, by virtue of the Supremacy Clause, the "law of the land." *Testa* stressed that the courts involved possessed "adequate and appropriate jurisdiction" under State law to handle this manner of adjudication. 330 U.S. at 394.

Testa posed an exceptional case: a State court which treated Federal law as if it were a foreign statute. Its citation of *Herb v. Pitcairn*, 324 U.S. 117 (1945), by way of contrast, *see* 330 U.S. at 394, underscores the limits of its holding. *Herb* had remanded, for consideration as an independent State ground for decision, the issue of whether the State court had jurisdiction to consider analogous State claims. *Cf. Martinez v. California*, 444 U.S. 277, 283-84 n.7 (1980) (Court has never read *Testa* to require that State courts accept claims under 42 U.S.C. §1983.). The power of the State court, *under State law*, to consider an analogous claim is thus a predicate to applying *Testa*'s rationale.

The *FERC dictum* suggested that *Testa*'s rationale might be applicable to State utility commissions, noting that their role was " 'functionally comparable' to that of a judge," 456 U.S. at 760 n.24, and indeed one holding general jurisdiction, for the utility boards were bound to hear claims by "any interested person." *Id.* at 768. In this view, the "seemingly precise parallel" between PURPA's procedural mandates and existing State process might be sufficient to avert a Tenth Amendment challenge to the statute on its face. 456 U.S. at 769 n.31.

The facts now before the Court stand in striking contrast to those of *FERC*. Under Arizona law, a county is but "a subordinate agency" of the State, *Peters v. Fry*, 71

Ariz. 30, 34, 223 P.2d 176, 178 (1950); its officials possess only those "quite limited" powers affirmatively granted "expressly or by necessary implication" by the state legislature, *Maricopa County v. Black*, 19 Ariz. App. 239, 241, 506 P.2d 279, 281 (1973). The State has long *forbidden* counties to engage in the only relevant adjudication, that of determining who should purchase or possess firearms. A.R.S. §13-3108. The sheriff's powers are defined by statute and do not include adjudication of any type, but are limited to straightforward enforcement functions – arrest and confinement, service of process, search and rescue. A.R.S. §11-441. The Sheriff has never engaged in regulation of the type commanded, and his office has no existing mechanism or budget for handling it. J.A. 9.

Sheriff Mack holds no adjudicatory powers, and neither he nor the county he serves may engage in adjudication of the type at issue here. 18 U.S.C. §922(s) seeks to compel him to engage in a function utterly outside his established purpose – to adjudicate disputes between his constituents and the commands of the Federal sovereign, to document his rationale, and to submit his findings to judicial review. Under *Testa* the Federal sovereign must take State adjudicators as it finds them, respecting the limits of the State's decisionmaking structure. *FERC*, 456 U.S. at 773-74 n.4 (Powell, J. concurring in part and dissenting in part). This Congress did not do.

If Sheriff Mack's established State duty is not "functionally comparable to that of a judge," it bears no relation at all to the duty of a court of general jurisdiction. Such a court is jurisdictionally distinguished by a requirement to take in all litigants and to apply in its entirety the

"law of the land." Such a court is functionally distinguished by its inability to set agenda and priorities: those are, so to speak, already subject to commandeering by litigants. *FERC*, 456 U.S. at 784-85 (O'Connor, J., concurring in part and dissenting in part). In contrast, Sheriff Mack is held accountable by his constituents for the setting of priorities – and in a degree beyond that even of a legislature. For him, the question is not which bill is first reported from committee, but why there was a twenty-minute delay in responding to a burglary in progress.[9]

The rationale of *Testa*, even if extended *per* the *dictum* of *FERC*, is inapplicable here. The official commanded to adjudicate is not an adjudicator, he has no established State power over matters analogous to those at issue, and he lacks both the legal and the functional attributes of a court of general jurisdiction.

B. 18 U.S.C. §922(s) Violates The Parameters Of Federalism As Recognized By This Court In *New York v. United States*.

Congressional attempts to commandeer the resources of other sovereigns did not end with PURPA, and at length the Tenth Amendment issue was inescapably presented by enactment of the "take title" proviso of the Low-Level Radioactive Waste Policy Amendments Act, 42

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[9] Since the filing of this action, a Graham County resident was reported missing and soon thereafter found dead in the desert. Sheriff Mack was promptly subjected to a recall petition based on claims his office had not responded with sufficient speed. In the sheriff's context, accountability for setting of priorities is no abstraction.

U.S.C. §§2021b-2021l. Under that proviso, unless a State made specified provision for disposal of its wastes by compact or construction of facilities, the State would take title to them upon tender.

A 6-3 majority of this Court held the proviso unconstitutional. *New York v. United States*, 505 U.S. 144 (1992). *Garcia* was held inapplicable, "as this is not a case in which Congress has subjected a State to the same legislation applicable to private parties." 505 U.S. at 160. Rather, the issue was one of the "affirmative" limits foreshadowed by *Garcia*'s reference to *Coyle*. The Court concluded:

> States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the United States. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead 'leaves to the several States a residuary and inviolable sovereignty'. . . .
>
> Whatever the outer limits of that sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program.

505 U.S. at 168.

1. 18 U.S.C. §922(s) Imposes Substantial Duties Upon State Officials, In Violation Of The Tenth Amendment.

18 U.S.C. §922(s) invents the post of "Chief Law Enforcement Official," ("CLEO"), specifically defining it

to include only those holding State office. Indeed, Congress rejected committee amendments which proposed to have the CLEO's tasks undertaken by Federal employees. *See* H.R. Rep. No. 103-344, at 38-39, *reprinted* 1993 U.S. Code, Cong. & Admin News at 2008.

The duties of the post are onerous. Merely insuring that a person is not barred from gun ownership under Federal law – 18 U.S.C. §922(g) – requires a determination that he:

> (1) has not been convicted of a crime punishable by more than a year's imprisonment (a term of art defined in 18 U.S.C. §921(a) to exclude, *inter alia*, convictions followed by restoration of civil liberties or Federal "relief from disabilities")
>
> (2) is not a fugitive from justice;
>
> (3) is not an unlawful user of controlled substances;
>
> (4) has never been adjudicated a mental defective or committed;
>
> (5) is not an illegal alien;
>
> (6) has not been given a dishonorable military discharge;
>
> (7) has never renounced his citizenship; and
>
> (8) is not subject to a domestic restraining order.

The Chief Law Enforcement Officer must make all "reasonable" attempts at these determinations each time a handgun is sold. 18 U.S.C. §922(s)(2). Where incomplete records suggest the purchaser "might" be precluded, the

CLEO must shift the burden of proof to the purchaser, ask for documentary evidence and assess its weight.[10]

Sheriff Mack documented the difficulties of compliance. National computer records largely reflect only outstanding warrants, J.A. at 5, while State records do not reflect the civil rights restorations given, often automatically, under State law. *Id.* at 5. If the check is extended beyond criminal records, it becomes all but impossible. Verifying State mental records would require a four-hour drive; ruling out illicit drug use might require checking any number of investigative files; Sheriff Mack can only speculate how he might "reasonably" determine if a person had been dishonorably discharged, was an alien, or had renounced American citizenship. J.A. at 6-7.

The CLEO's duties do not end here. If the results are negative, the CLEO must destroy the request and also "any record containing information derived from the statement. . . . " 18 U.S.C. §922(s)(6)(B). If the results are positive, the CLEO must block the sale and, if requested, serve a written explanation of his action. 18 U.S.C. §922(s)(6)(C). A rejected buyer has a Federal cause of action against the CLEO's employer, with recovery of attorney's fees. 18 U.S.C. §925A.[11]

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[10] *See* note 3, *supra*.

[11] The statute purports to immunize the Sheriff against other civil liability arising from his preventing, or failing to prevent, a person from obtaining a firearm. 18 U.S.C. §922(s)(7). It does not expressly immunize his employing government. *Compare* 18 U.S.C. §922(t)(6) (granting immunity under permanent system both to official and to local government). The Federal grant of immunity, if applicable, may itself exceed

The statute clearly runs afoul of *New York*'s invalidation of the "take title" requirement. Congress can no more command Sheriff Mack to take responsibility for Federally-licensed dealers' transactions than it could command New York authorities to take responsibility for third parties' nuclear scrap. Either schema conflicts with this Court's conclusion that "The Federal Government may not compel the States to enact *or* administer a federal regulatory program." 505 U.S. at 188 (emphasis supplied). *See* Deborah Merritt, *Three Faces of Federalism*, 47 Vand. L. Rev. 1563, 1580 n.65 (1994).

New York predicted that such Federal "commandeering" would undermine the very core of federalism, permitting one sovereign to shift accountability to another: "[I]t may be State officials who bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." 505 U.S. at 169. The statute at issue here fulfills that prediction. Sheriff Mack is forced to reallocate scarce resources entrusted to him by his electorate. He is blamed by them for the resulting diversion. App. 65-66. Moreover, when the purchaser disputes the completeness of the records Sheriff Mack is

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constitutional boundaries. Arizona has abandoned sovereign immunity. *See Priichard v. State*, 163 Ariz. 427, 788 P.2d 1178 (1990). Issuance of a permit, other than those relating to professions, is actionable if grossly negligent. A.R.S. §12-820.02(5). The State constitution prohibits enactment of laws restricting recovery for wrongful death. Ariz. Const. Art. II §31. An attempt to immunize a State official against a tort claim brought by a State resident, under State law in a State court, poses its own Tenth Amendment concerns.

forced to serve as an adjudicator and to accept the blame for the decision Congress forced him to make. App. 65.

2. The Ninth Circuit's Attempt To Distinguish *New York* Fails.

In creating a federal system, the Framers took comfort in the reflection that "Power [is] almost always the rival of power," *Federalist No. 28* (A. Hamilton), anticipating that "The different governments will control each other, at the same time that each will be controlled by itself." *Federalist No. 51* (J. Madison). To separate each government's line of command, the Framers rejected alike Hamilton's proposals for Federal appointment of governors, Pinckney's call for State enforcement of Federal decisions, and Randolph's proposal for a congressional "negative" upon State law. *See* James Madison, Notes on Debates in the Federal Convention 31, 139 (A. Koch, ed. 1966).

These practical judgments have withstood the hard test of two centuries. They are set at nought by the Circuit decision below. To sustain the statute, the Circuit rewrites the results of 1787, creating Federal powers which far exceed those rejected in the Convention. Rather than a "negative" upon State law, Congress acquires nearly unlimited power to *compel action* to its specification.

The Ninth Circuit attempted to distinguish *New York* on the ground that the statute there at issue sought to mandate policy making in the form of regulation or statute, whereas 18 U.S.C. §922(s) mandates enforcement of

externally-dictated policy. App. 10-12. The distinction drawn is both incorrect and artificial.

An examination of the facts of *New York* demonstrates the untenable nature of the enact/enforce distinction. In briefing *New York*, the United States contended that the statute at issue gave States three alternative modes of compliance, two of which required *no* regulation of private conduct:

> (1) "the simple act" of executing an appropriate compact, which required "no significant regulatory activity whatsoever;"
>
> (2) taking title to the waste and building its own facilities, which would not involve "implementation of federal policies regulating private activity" or
>
> (3) regulating privately-owned storage facilities.

Brief of the United States, *New York v. United States*, No. 91-543, at 34-37. This Court concluded that *none* of the posed alternatives passed Tenth Amendment muster, and in so doing explained quite clearly the breadth of its use of "administer:"

> Respondents emphasize the latitude given to the States to implement Congress' plan. The Act enables the States to regulate pursuant to Congress' instructions in any number of different ways. States may avoid taking title to contracting with sited regional compacts, by building a disposal site alone or as a part of a compact, or by permitting private parties to build a disposal site. . . . This line of reasoning, however, only underscores the critical alternative a State lacks:

> A State may not decline to administer the federal program.

505 U.S. at 176-77. "Administer" was thus clearly used to encompass, not only promulgation of regulations directed at private conduct, but State decisions regarding the use of its own resources.

Unwilling to accept this Court's clear statement of the standard, the Circuit tortures "or administer," arguing that this Court must have meant only " 'administer' in the sense of being in charge of a program and making policy decisions. . . . " App. 11, n.7. The Circuit's gloss is inconsistent with *New York* and, for that matter, with common sense: if the CLEO, who processes the forms, sets the standards, makes the rulings, and is subject to judicial review, is not "in charge" of the program, one can only wonder who is.

The artificial nature of the Circuit's distinction is illustrated by the facts of the present case. Adjudication is as much an aspect of policymaking as is the promulgation of regulations. It involves the ultimate form of accountability: the adjudicator makes not general rules, but concrete decisions announced to parties in conflict. 18 U.S.C. §922(s) requires Sheriff Mack to make rulings regarding his own constituents' rights. When records are ambiguous, as they were in the only computer "hit" he obtained, he is ordered to "shift the burden" to the constituent – to reject the constituent's word on the matter – and to demand evidence and assess what is provided.

Allocation of public resources is likewise a policy function, and here the statute compels the Sheriff and him alone to make the relevant decisions. Beyond the

expressly-mandated research into two Federal record systems, he must decide how much of an inquiry constitutes a "reasonable effort." He and he alone must account to his constituents for consequences of the diversion.

The Circuit's newfound theory of federalism narrows the Tenth Amendment to a geometrical point, an abstraction with location but no dimensions or mass. It opens the way for Congress to pass statutes which allow it to take the credit and delegate the blame. No longer bound by restraints of budget and manpower, Congress is free to expand the powers of the Interstate Commerce Commission, the Federal Trade Commission, or any other chosen agency, by allowing them to conscript State agencies and manpower. It can order Federal lands patrolled by State land agencies, and divert county officials to secure the borders. "As ideas for federal projects grow, but resources lessen, the incentives will grow stronger for Congress to command the state governments to perform federal programs for free." Lipner, *Imposing Federal Business on Officers of the State: What the Tenth Amendment Might Mean*, 57 Geo. Wash. L. Rev. 907, 929 (1989). The Federal sovereign need no longer offer conditional grants-in-aid as inducements to changes in criminal justice programs, highways, or welfare programs; it need no longer contract with States for housing of Federal prisoners or securing of Federal facilities. It has but to command.

The conflict between the Ninth Circuit's ruling and *New York* is absolute. If the Ninth Circuit is correct, then *New York* is wrong: the Federal government *could have*

ordered State officials to take title to the waste and build appropriate disposal sites; that option involved no regulatory decisionmaking save that relating, as here, to the allocation of the State's own resources.

C. 18 U.S.C. §922(s) Presents A Far More Egregious Violation Of Federalism Than Was Present In *New York*.

To the extent 18 U.S.C. §922(s) *could* be distinguished from the statute invalidated in *New York*, it presents a *more serious* violation of the Tenth Amendment norms in terms of accountability, justification, and impact upon federalism.

1. Aggravation Of Misplaced Accountability.

New York's "take title" proviso at least allowed a division of misplaced accountability: any decisions which would be made, *e.g.*, to enter a compact or to site a waste disposal facility, would be shared by the entire legislature. 18 U.S.C. §922(s) hands the sheriff complete and sole responsibility for enforcement; indeed, it thrusts him into face-to-face confrontations with his constituents. The constituent angered at the sheriff's decision to withhold authorization, App. 65, did not blame Congress, nor the State legislature *en masse*: he blamed Richard Mack.

Further, 18 U.S.C. §922(s) presents Sheriff Mack with a far more difficult task of correcting the misplaced accountability. Under the "take title" proviso, it was at least possible for the legislature to explain that the Congress had forced it to take title to the waste: here, Sheriff

Mack must try to explain why a delayed response to a burglary call was somehow due to a Congressional enactment. In *New York*, the misplaced accountability was at least divisible and demonstrable: here it is focused and insidious.

2. Lack Of Process Justification.

In *New York* the United States could at least contend that the statute was a Federal attempt to redress an interstate conflict, undertaken after calls from the States themselves. *See New York*, 505 U.S. at 191-94 (White, J., dissenting). The National Governors' Association had been prominent in the negotiations, and 42 States had already entered into compacts. *Id.* at 190-91. Thus the dissent submitted that the statute was "very much the product of cooperative federalism, in which the States bargained among themselves," *Id.* at 194.

Here, there can be no such claims. 18 U.S.C. §922(s) was the outcome of no compacts, no compromise, no negotiation. §922(s) is a straightforward attempt by the Federal government to force duties upon unwilling officials.

Nor can it be argued that 18 U.S.C. §922(s) represents "a delicate compromise between . . . overburdened States . . . and the rest of the States." 505 U.S. at 200 (White, J., dissenting). The statute affects *only* sales by licensed dealers, and such dealers are generally forbidden to sell to residents of other States. 18 U.S.C. §922(a)(2), (b)(3); 27 C.F.R. §178.124(c)(1), 178.11 "Identification Documents"

(requiring buyer to present identification showing residence).[12]

3. Mandated Violation Of State Law.

The mandate at issue in *New York* went to the State itself, which ultimately commands its agents' legal authorities. Once the State had decided on its mode of compliance, it had all legal authority necessary to do so.

In 18 U.S.C. §922(s), Congress did not address its commands to a sovereign, but to one of the sovereign's servants. Sheriff Mack possesses only the legal authority delegated to him by the people of the State. These have granted him limited authority bearing no relation to the adjudicatory tasks assigned by the Federal statute, and they have specifically forbidden him to undertake the sort of duties that the statute commands.

The ability of the people of a State to constrain the officials they choose and empower is critical to the "full realization of our liberties." Justice William Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977). *See also* Feldman & Abney, *The Double Security of Federalism: Protecting Individual Liberty Under the Arizona Constitution*, 20 Ariz. St. L.J. 115

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[12] This is not to deny that firearms may flow, illicitly, between States. But §922(s) is not directed at stopping such transfers, which either involve sellers other than licensed dealers, or falsified identification. §922(s) does not cover the former, and is not intended to address the latter: it simply provides for determining whether the person to whom the buyer's identification pertains has a record.

(1988). If Congress can command State officials to act as Federal agents, subject only to the restrictions placed on the national government in 1791, then the protections of the people of the States have since imposed on *their own agents* can be negated by the Supremacy Clause. Under §922(s), the officials of the State – holding offices established, empowered, and funded by its people – are no longer under the command of the State and its people.

4. Dilution Of Essential Checks And Balances.

To the Framers, federalism held value as a means of checking the ambitions of either level of government.

> Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition toward the general government. The people, by throwing themselves into either scale, will infallibly make it predominate. If their rights are invaded by either, they can make use of the other for redress.

Federalist No. 28 (Hamilton).

18 U.S.C. §922(s) negates this critical balance. The actions of State officials toward their constituents are subject to complete and direct Congressional control. The people are left with neither the advantage of dual sovereignty – two authorities who may compete for their support – nor that of single sovereignty – absolute accountability. Instead they are subject to a single ruler, whose functions are screened behind agents it does not appoint but whose actions it commands.

5. Impairment Of The People's Right To Choose Their Officials.

The "authority of the people of the States to determine the qualifications of their most important governmental offices" is at the core of republican theory. *Gregory v. Ashcroft*, 401 U.S. 452, 463 (1991). "Through the structure of its government, and the character of those who exercise governmental authority, a state defines itself as a sovereign." *Id.* at 460.

In the ruling below, the Ninth Circuit lightly dismissed Sheriff Mack's Thirteenth Amendment claim with the note that a State official may escape compelled services under 18 U.S.C. §922(s) by resigning his office. App. 45. Under this view, Congress may dictate whom the people of the State choose to represent them; those unwilling to labor as Congress may prescribe need not apply. The people of a State may, under *Coyle*, choose their capital, but not they may not choose who fills it.

To the extent that any distinction can be drawn, 18 U.S.C. §922(s) presents an aggravation, not a mitigation, of the Federalism problems presented in *New York*. It is an exceptionally egregious violation of the principles of federalism protected by the Tenth Amendment.

In sum, 18 U.S.C. §922(s) marks a blatant violation of the principles of federalism. The legislatures of the States are not merely commanded; they are supplanted, and orders issued directly to their officials. Those officials in turn are commanded to act in excess of the powers given by the people of the State, and even in defiance of the legislature's commands. The officials are commanded to act without compensation, but with civil liability in the event of error.

The exceptional nature of the constitutional violation is apparent: to defend 18 U.S.C. §922(s) the United States must abandon – indeed, reverse – the Tenth Amendment position it has uniformly advocated before this Court. 18 U.S.C. §922(s) is an egregious violation of the principles of federalism recognized and guaranteed by the Tenth Amendment.

II

The Commerce Power Does Not Justify A Federal Mandate That A State Official, Precluded By Statute From Interfering With Commerce, Regulate Commerce To Federal Specification

18 U.S.C. §922(s) attempts to regulate, not commerce, nor State interference with commerce, but a State official who exercises limited local police powers – indeed, an official whose people have forbidden him to affect the relevant commerce. The command far exceeds Congressional Article I powers.

At the core of the Constitution's apportionment of power was the decision to give the national government powers that were "few and defined," *Federalist No. 45* (Madison), consisting of the "great and aggregate interests" of the new nation. *Federalist No. 10* (Madison).

Among those defined powers was the authority "to regulate commerce . . . among the several States." Art. I, §8. While this power is near-plenary, with "no limitations other than those prescribed in the constitution," *Gibbons v. Ogden*, 22 U.S. 1, 196 (1824), its scope was still restricted to regulation of "commercial intercourse," and only that "among the several states." *Id.* at 189-90.

Exertion of congressional powers over commerce have taken three historic forms: regulation of the channels of commerce, protection of instrumentalities of commerce, and regulation of acts which substantially affect commerce. *United States v. Lopez*, 115 S.Ct. 1624, 1629-30 (1995) (*"Lopez"*). To the extent a State engages in or affects commerce, it is subject to regulation. *Fry v. United States*, 421 U.S. 542, 547-48 (1975) (engaging in commerce through employment); *EEOC v. Wyoming*, 460 U.S. 226, 235 (1983) (same). To the extent it restricts commerce, its acts are subject to Congressional preclusion or pre-emption. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26 (1977); *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 633-34 (1973).

As interstate commerce itself has grown, so have powers over it. But in enacting 18 U.S.C. §922(s) Congress chose to regulate, not commerce, but the States themselves. It issued commands to Sheriff Mack, not on the basis that he or his State were burdening commerce, but on the basis that he was *not* burdening it and that his State had *forbidden* him to do so.

For nearly two centuries, it remained undisputed that the Commerce Clause does not authorize Federal commands that the States regulate commerce. *See District of Columbia v. Train*, 521 F.2d 971, 992 (D.C. Cir. 1975), *remanded for consideration of mootness* 431 U.S. 99 (1977) ("We are aware of no decisions of the Supreme Court which hold that the federal government may validly exercise its commerce power by directing nonconsenting states to regulate activities affecting interstate commerce, and we doubt that any exist."). Commerce Clause issues instead revolved around determining the scope within Congress which might regulate private individuals, and that within which the State might not. *See, e.g., Gibbons v.*

Ogden; Houston, East and West Ry. Co. v. United States, 234 U.S. 342 (1914); *NLRB v. Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1937).

Only in 1975 did an arm of the national government assert authority to command State officials to regulate interstate commerce; the attempt ended when the United States declined to defend it before this Court.

The asserted power arose against the background of an Environmental Protection Agency "veto" and preemption of certain State attempts at Clean Air Act compliance, with consequent imposition of Federal standards. But rather than use Federal resources to enforce the Federal standards, EPA asserted the statutory power to force State agencies to apply them.

The Fourth, Ninth, and District of Columbia Circuits held that such a construction would exceed Commerce Clause powers, and rejected the asserted power. *See State of Maryland v. EPA*, 530 F.2d 215, 227-28 (4th Cir. 1975); *Brown v. EPA*, 521 F.2d 827, 837-39 (9th Cir. 1975); *District of Columbia v. Train*, 521 F.2d 971, 992 (D.C. Cir. 1975).

After this Court granted certiorari, the United States declined to defend the challenged regulations. It instead informed the Court that the EPA would amend portions of the regulations, and that the Administrator "has never asserted any power to compel the State to carry out its governmental responsibilities under an implementation plan," Brief for the Federal Parties, *EPA v. Brown*, No. 75-909, at 20 n.14. The remaining regulations were to be justified, not as a command to the State to regulate private conduct, but as a command to the State to restrict pollution created by its own actions:

> The State is, in either case, subject to federal regulation only to the extent it is responsible for the pollution, and only when its responsibility stems not from mere failure to regulate private activities, but from its ownership and control of the facilities used in the process of contamination of the air. The power asserted by the Administrator is only over the State as polluter, not over the State as State.

Id. at 20. In light of the government's broad retreat, this Court remanded for consideration of mootness. *EPA v. Brown*, 431 U.S. 99 (1977).

The issue, indefensible in 1977, now reappears. It is presented, paradoxically, in the wake of this Court's reiteration that:

> While the Framers no doubt endowed Congress with the power to regulate interstate commerce in order to avoid further instances of the interstate trade disputes that were common under the Articles of Confederation, the Framers did *not* intend that Congress should exercise that power through the mechanism of mandating State regulation. The Constitution established Congress as a 'superintending authority over the reciprocal trade' among the States, The Federalist No. 42, p. 268 (C. Rossiter, ed. 1961) by empowering Congress to regulate that trade directly, not by authorizing Congress to issue trade-related orders to State governments.

New York, 505 U.S. at 180.

Sheriff Mack's position was, and remains, straightforward: although firearms may flow in interstate commerce, he is not a firearms dealer, but a State official exercising police powers, limited by statute, in Graham

County. He neither engages in nor interferes with interstate commerce when he refuses to supervise Federal firearms licensees. He is not ordered by the State to affect commerce in firearms – in fact, as noted above, the statutes of the State have expressly forbidden him to do so.

The Ninth Circuit here disposed of Commerce Clause concerns with the note that regulation of firearm sales lies within the commerce power, and the statute in question focuses on sales rather than simple possession. App. 5 n.5. The fact that *private citizens* in a State engage in commerce is thus made dispositive of the Congressional power to command officials of that State. If this is good law, then *New York* cannot be: nuclear waste travels in and affects commerce, and thus Congress would have had every right to command States to deal with it. If this is correct, then the Court need not have labored so mightily to sustain the measures at issue in *FERC* and in *Hodel*: the mere fact that residents of Mississippi consume power, and those of Virginia engage in mining, would have justified any mandate Congress issued, or could have issued, to the States. Indeed,

> By such logic, there is no state governmental function which Congress cannot reach and control. . . . The states can be forced to act or not to act, as Congress chooses to define the burden. . . . The traditional remedy of unwilling states, abandonment of the field to direct federal control, is barred.

David Salmon, *The Federalist Principle: Interaction of the Commerce Clause and the Tenth Amendment in the Clean Air Act*, 2 Col. J. Environ. L. 290, 326-27 (1976).

The Ninth Circuit majority extends Commerce Clause powers to the point where they "effectively obliterate the distinction between what is national and what is local."

NLRB v. Jones & Laughlin Steel, 301 U.S. at 37. It brings to fruition the fears dismissed by the *FERC* majority.[13] If a State affects commerce, it may be stopped or restricted; if it withdraws from affecting it, it may be commanded to do so. If its official is empowered to undertake the task, so much the better: if not, Congress may simply bestow upon him the authority when it hands him the duty.

III

The Unconstitutional Portions Of 18 U.S.C. §922(s) Cannot Be Severed From The Valid Portions

18 U.S.C. §922(s)'s imposition of duties violates the Tenth Amendment and exceeds Commerce Clause powers. The question remains whether §922(s) falls, or only some severable portion of it.

A. Severance Is Proper Only Where The Constitutional Portion Of A Statute Is Fully Operative And In The Manner In Which The Legislature Intended.

Severability hinges upon a two-part test. *Alaska Airlines v. Brock*, 480 U.S. 678, 684-5 (1987). To be severable,

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[13] The *FERC* dissents suggested that the decision opened the way to Federal control of all State functions; the majority dismissed this as "apocalyptic" and "overstated," since the holding "does not suggest that the federal government may impose conditions on state activities in fields that are not preemptible. . . . " 456 U.S. at 769-70, n.32. If the Ninth Circuit majority is correct, pre-emption is irrelevant: a State's apparatus may be commandeered even if it withdraws from the field.

the stricken provisions must be "functionally independent" of the surviving ones. *United States v. Jackson*, 390 U.S. 570, 586 (1968). Moreover, the statute as severed must function "in a *manner* consistent with the intent of Congress." *Alaska Airlines*, 480 U.S. at 685 (Emphasis the Court's); that is, elimination of the statute's invalid portions must leave "completely unchanged its basic operation." *United States v. Jackson*, 390 U.S. at 586.

B. The Unchallenged Portions Of 18 U.S.C. §922(s) Are Not Fully Operative In The Manner Congress Intended.

Stripped of compulsory background checks, 18 U.S.C. §922(s) becomes a waiting period, coupled with the possibility that the CLEO *may*, if he desires, perform a check. Every licensed dealer in Graham County will be obligated to transmit notices to Sheriff Mack – who may promptly discard them – and every purchaser will wait five days for a determination that will never come. The "program" would still exist, but – as explained below – it would bear little relation to Congressional intent.

1. Severance Would Change The Statute Into A Form Which Congress Refused To Enact.

As discussed *ante*, the 102d Congress *had* considered H.R.7, which provided for a fixed waiting period with optional checks. The proposal approved by the 103d Congress differed enormously from this approach, making the background check mandatory and the waiting period optional, ending the moment the check was performed. Rep. Zimmer explained the impact:

> Two years ago I voted against an earlier version of the Brady bill, which required a 7-day waiting period for handgun purchases with only an optional background check. . . .
>
> The legislation we are voting on today addresses my principal objections to the 1991 Brady bill. The background check is no longer optional and the waiting period will be eliminated as soon as a national instant check system can be implemented.

Id. at 9107-08. The 103d Congress *four times* rejected, in House subcommittee, committee, and on the floor, amendments proposed by Rep. Schiff to make the check optional. *See* H.R. Rep. No. 103-344 at 38-39, *reprinted* 1993 U.S. Code, Cong. & Admin. News at 2008-09 (subcommittee and committee action); 139 Cong. Record H9093, H9143-44 (Daily ed., Nov. 10, 1993) (proposed floor amendment and motion to recommit).

2. Severance Would Yield A Statute With Disadvantages Which Congress Did Not Weigh.

Severance assumes that the resulting statute would be a subset of the original; it is inappropriate where severance would "cause results not contemplated or desired by the legislature." *Connally v. Union Sewer Pipe Co.*, 184 U.S. 540, 565 (1902). Two such results are apparent here.

First, a shift from mandatory to voluntary background checks radically alters the cost/benefit balance. On the benefit side, a Federally-imposed voluntary check achieves little. Background checks were always an option

for States which desired to have them; States which do not desire them are unlikely to perform them if they are proclaimed optional.[14] An optional check thus incurs the full burden of a mandatory check (a five-day wait for millions of constituents) while not increasing the benefit sought *vis a vis* that of the status quo. In rejecting H.R.7, Congress showed awareness of this different balance. "This not only penalizes law-abiding citizens, it does not even ensure that a check is done." 137 Cong. Record H2831 (Daily ed. May 8, 1991) (Rep. Ballenger).

Second, the debate over H.R.7 shows that Congress foresaw special disadvantages to non-mandatory background checks. Rep. Staggers complained that the option permitted discrimination: "If in fact you live in a neighborhood that is an Afro-American neighborhood, chances are the police are going to check your records. If you come from an affluent white neighborhood, they probably are not going to find the time . . . " 137 Cong. Record at H2668 (Rep. Staggers) (Daily ed., May 8, 1991). Rep. Ballenger voiced similar concerns. *Id.* at H2831. The potential for discriminatory application was not weighed by the 103d Congress, simply because it had no application to the bill it passed. To sever the statute here leads, not merely to a law with somewhat reduced benefit, but

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[14] It might be suggested that a severed 18 U.S.C. §922(s) would give an opportunity to State officials who privately desire to perform checks but are frustrated by the refusal of their constituents to give them the power. Yet this approach yields an anomalous result. It seeks to save a portion of the statute from 10th Amendment invalidation by suggesting that its value lies in protecting State officials from the control and oversight of the people of the State.

to a new statute with problems that Congress has not weighed.

3. Severance Would Create A Statute Containing Inconsistencies And Incongruities.

The severed form of the statute would not even be internally consistent. As enacted, the statute's timetables mesh and its exceptions track its commands precisely. If severed, its provisions make little sense indeed:

As Enacted:

(1) Dealer sends form to CLEO and must wait *5 business days* before transferring firearm. 18 U.S.C. §922(s)(1)(A)(ii).

(2) CLEO must investigate purchaser within *5 business days*. 18 U.S.C. §922(s)(2).

> (a) Unless CLEO obtains a "hit," CLEO destroys forms in 20 days. 18 U.S.C. §922(s)(6)(C).
>
> (b) If "hit" results, and is challenged, CLEO must provide rationale in 20 days. 18 U.S.C. §922(s)(6)(B)(i).

Exception: dealer need not send form or wait if State law *requires* an "authorized government official" to *"verify" legality before* transfer. 18 U.S.C. §922(s)(1)(D).

As Severed:

Dealer sends form to CLEO and must wait *5 business days* before transferring firearm. 18 U.S.C. §922(s)(1)(A)(ii).

> Unless CLEO checks and obtains a "hit," CLEO destroys forms in *20 days*. 18 U.S.C. §922(s)(6)(C).

Exception: dealer need not send form or wait if State law *requires* an "authorized government official" to *"verify" legality before* transfer. 18 U.S.C. §922(s)(1)(D).

As severed, the times for the background check and the waiting period no longer tally; the only time limit on the check is the document destruction deadline of 20 days, yet the dealer may transfer the gun within five.

As severed, the exception does not track the rule. Under the statute as enacted, a State gains exemption from a mandatory check by creating its own mandatory check. As severed, the statute would require only an *optional* check, yet to gain exception the State must have a *mandatory* one; thus a State could have legal requirements *stricter* than the Federal plan (*i.e.*, a 15 day wait with optional checks) yet find it *did not qualify*: its CLEOs must still be served with forms despite the fact that another official has been assigned to perform the voluntary checks. Whether Congress would have enacted a bill with these incongruities is for it alone to decide.

Mandatory background checks, the core of §922(s), are constitutionally void. Severance creates, not a subset of the legislation, but a complete substitute, and one with incongruities and disadvantages Congress never had reason to weigh. 18 U.S.C. §922(s) cannot be severed; it falls as a whole.

CONCLUSION

18 U.S.C. §922(s) exceeds Commerce Clause powers delegated by the people to Congress, and violates the principles of federalism given voice in the Tenth Amendment. The offending portions cannot be stricken without creating a statute Congress declined to pass, and which contains unique disadvantages and incongruities. We respectfully submit that the Court should reverse the decision of the United States Court of Appeals for the Ninth Circuit and hold 18 U.S.C. §922(s) invalid in its entirety.

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